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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1150

DAVID M. GOODMAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF OF THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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The American Federation of Government Employees, with leave of this Court, respectfully presents this brief in support of the Petition for a Writ of Certiorari. Counsel for petitioners David M. Goodman, No. 1150, Joseph Cohen, No. 1151, and John V. Coughlin, No. 1152, and counsel for respondent have granted consent to the filing of this brief amicus curiae. It is respectfully requested that this brief be considered in support of all three Petitions for Certiorari in Nos. 1150, 1151 and 1152.

INTEREST OF AMICUS CURIAE

The American Federation of Government Employees is a non-profit voluntary organization. It is composed of more than 230,000 employees of the United States Government, who are members of approximately 1,200 lodges located throughout the United States and its territories.

The Federation has an interest in these cases by reason of the substantial effect that the decision of the Court of Claims will have upon the Federation's members, as well as upon all employees of the Federal Government entitled to hearings before the Civil Service Commission on suspension or removal actions by the various agencies and departments of the United States Government. Under Executive Order 10988, 3 C.F.R. 521 (1959-1963 Comp.), the provisions of Section 14 of the Veterans Preference Act of 1944 have been made applicable to all employees of the Federal Government in competitive Civil Service positions. At the present time, approximately 90 percent of all employees of the Federal Government are entitled to a hearing before the Civil Service Commission under the provisions of Executive Order 10988. The Federation seeks to emphasize the far-reaching effect of the decision of the Court of Claims, which seriously dilutes the rights of all employees entitled to hearings before the Civil Service Commission.

ARGUMENT

The decision of the Court of Claims has seriously limited two fundamental rights inherent in any fair hearing before the Civil Service Commission. Those rights are the right of the employee to see the evidence presented against him and the right to cross-examine adverse witnesses.

The Court of Claims has held that the right to a fair hearing before the Commission did not require the disclosure to the employee of the full contents of statements of adverse witnesses. Rather, the court ruled that the

employee was entitled to see only those *portions* of statements actually *presented* by the employing agency to the Civil Service Commission. Such a conclusion strikes at the very heart of the fair hearing intended by Congress under Section 14 of the Veterans Preference Act, now made applicable to most Federal employees under Executive Order 10988, 3 C.F.R. 521 (1959-1963 Comp.).

If the employing agency is at liberty to select portions of statements and relevant evidence it presents to the Commission in justification of disciplinary actions against employees and withhold other parts of statements, the hearing before the Civil Service Commission will become merely form without substance. Given judicial sanction, employing agencies will be free to edit, expurgate, blockout and otherwise tailor the statements of witnesses and evidence to fit the agencies' purposes. The employee, already at a natural disadvantage in gathering and submitting facts and evidence to the Civil Service Commission on his own behalf, will have the additional burden of being deprived of the opportunity to see the full contents of statements of the witnesses against him.

To require the employing agency to permit the employee to see the complete statements of adverse witnesses and documents presented to the Commission should be self-evident. The Court of Claims stated that to permit the employee to see the complete statements of adverse witnesses would require that the employing agency present *all* of the agency's file to the Commission. This is a non sequitur. In order to prepare an adequate defense to the charges against him, the employee must be permitted to see the full contents of adverse statements submitted to the Commission. Fair play requires that any party submitting evidence to an impartial arbiter permit the opposing party to see all of the contents of documents tendered.

This Court's ruling in *Jencks v. United States*, 353 U.S. 657 (1957) imposed a rule of simple fairness in re-

quiring the Government to reveal to the accused statements of witnesses relied upon in criminal proceedings. That rule should be applied to hearings before the Civil Service Commission. There is no warrant, either in the Veterans Preference Act or the Civil Service Commission regulations, for a rule that the employing agency may unilaterally determine what portions of statements of witnesses are helpful or harmful to an employee, or to leave to the discretion of the agency the decision as to when a witness is telling the truth and when he is not. This is the function of the Civil Service Commission, entrusted to it by Congress.

With respect to the right of the petitioners to have as witnesses at the Civil Service Commission hearing those employees of the employing agency whose statements were relied upon by the agency, the Court of Claims interpreted this Court's decision in *Williams v. Zuckert*, 371 U.S. 531, *case remanded for rehearing on petition for rehearing*, 372 U.S. 765 (1963), to require a personal request of such witnesses, even though the employing agency admitted it had been requested to furnish those witnesses at the Commission hearing. The requirement of personal requests in a situation where witnesses are under the direct control and command of the employing agency is entirely impractical and imposes, again, an added burden upon the employee where there should be none. If the employee makes a timely request for the presence at the Commission hearing of employees of the employing agency either directly to the employing agency or through the Civil Service Commission, those employees should be present at the hearing, or their presence excused only for legitimate reasons. Common sense dictates that if an employing agency is to rely upon written statements of its own employees, it should present those employees for cross-examination upon proper request of the employee.

The decision by the Court of Claims represents a marked regression in the development of the rights of

Government employees in proceedings before the Civil Service Commission. The decisions by this Court in *Greene v. McElroy*, 360 U.S. 474 (1959), *Vitarelli v. Seaton*, 359 U.S. 535 (1959), and *Williams v. Zuckert*, 371 U.S. 531, *case remanded for rehearing on petition for rehearing*, 372 U.S. 765 (1963), have steadfastly emphasized the importance of strict observance of procedural safeguards to Government employees in discharge proceedings in which there are so few substantive rights.

The blocking-out and expurgation of statements of witnesses, and the refusal to permit the employee to see the full contents of statements is alien to all of our concepts of fundamental due process. Given the prerogative not only to decide what portions of statements are "truthful" and the right to refuse to present its own employees for cross-examination by the employee before the Civil Service Commission, the so-called "hearing" before the Commission is reduced to ritualism, and not to a legitimate attempt to find the truth and to do justice, both to the employee and to the United States Government.

Respectfully submitted,

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